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Federal Bar Council

MARK C. ZAUDERER
President

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Executive Director

VIA FEDEX
The Administrative Office of the United States Courts
Court Administration Policy Staff
Attn: Privacy Comments
Suite 4-560
One Columbus Circle N.E.
Washington, D.C. 20544

Re: Comments on the Proposal to Limit Access to Certain Documents in Federal Court Criminal Case Files

Dear Sir or Madam:

I am the President of the Federal Bar Council (the "Council"), a non-profit organization of approximately 2,500 federal court practitioners and judges in the Second Circuit. On behalf of the Council, I submit comments on a proposal to restrict public electronic access to plea agreements in criminal cases, which may contain information identifying defendants who are cooperating with law enforcement investigations. For the reasons discussed herein, the Council does not believe that the Judiciary should adopt the proposal. I note, however, that our member judges have not participated in the formulation of our views and the views expressed in this letter do not necessarily reflect those of any of our member judges.

Public access to criminal trials and criminal case files (including plea agreements) has long been a valued tradition in our legal system. The United States Supreme Court and the Second Circuit Court of Appeals have recognized a qualified First Amendment right of the public and the press to access criminal trials as well as documents filed in the course of a trial. See Press-Enterprise Co. v. Superior Court of California for Riverside County (Press-Enterprise II), 478 U.S. 1, 7-9 (1986); United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) (qualified First Amendment right of access extends to plea hearings and documents filed in connection with those hearings); See also United States v. Alcantara, 396 F.3d 189, 191-92 (2d Cir. 2005).

In accordance with this tradition, the Judicial Conference of the United States (the "Judicial Conference") examined the feasibility of making criminal case files accessible to the public electronically in connection with its development of a policy on privacy and public access to electronic case files. The Judicial Conference recognized that public electronic access to criminal files was not without privacy and security implications. The Judicial Conference acknowledged that making criminal files available electronically would enable an individual to "access documents filed in conjunction with a motion by the government for downward departure for substantial assistance[,]" and gather information that "could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families." REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2001) (hereinafter, the "REPORT OF THE JUDICIAL CONFERENCE COMMITTEE"), available at http://www.privacy.uscourts.gov/Policy.htm. It further acknowledged that such access could also "increase the risk of unauthorized public access to preindictment information, such as unexecuted arrest and search warrants[,]" which could "severely hamper and compromise investigative and law enforcement efforts[.]" Id.

In light of the concerns raised about public electronic access to criminal case files, in September 2001, the Judicial Conference adopted a privacy policy that prohibited public electronic access to criminal case files with the statement that it would revisit the issue. In March 2002, the Judicial Conference implemented a pilot program that selected 11 courts to permit electronic access to criminal case files. A study of these courts "found no harm from enhanced access to criminal case file documents." News Release, Admin. Office of the U.S. Courts, Funding and Electronic Access Top Judicial Conference Agenda 2 (March 16, 2004), available at http://www.uscourts.gov/Press_Releases /judconf031604.pdf.

After considerable study and comment, the Judicial Conference concluded that "the benefits of remote public electronic access to criminal case file documents outweighed the risks of harm such access potentially posed." GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES (2003) (hereinafter, the "GUIDANCE FOR IMPLEMENTATION"), http://www.privacy.uscourts.gov/crimimpl.htm. Indeed, the Judicial Conference noted that broadening public access through making case files electronically available has many benefits to the courts, attorneys, litigants and the public. Id. Specifically, "such access provides citizens the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government." Id. "Electronic access 'levels the geographic playing field' by allowing individuals not located in proximity to the courthouse easy access to what is already public information." Id. Also, electronic access discourages profiting from the sale of public information. Id.

Thus, in September 2003, the Judicial Conference adopted a policy that, in substance, intended to make all criminal case files that are available to the public at the courthouse available to the public via electronic access (the "2003 Policy"). The idea was that if a document can be accessed from a file at the courthouse, it should be available to the public electronically.

The Department of Justice ("DOJ") has requested that the Judicial Conference restrict public electronic access to plea agreements in criminal cases, which may reveal that a defendant is or has been cooperating with law enforcement. The request is motivated by concerns that the policy of allowing electronic access to publicly available plea agreements and the wide dissemination of such agreements may compromise the safety of cooperating defendants and lead to retaliation or witness intimidation.

In proposing the restriction of electronic access to plea agreements, the DOJ raises valid concerns. Certainly, electronic access enables a larger group of individuals to readily retrieve plea agreements on file with the courts. As a result, it may be easier for individuals to discover the identities of cooperating defendants, and potentially compromise the integrity of ongoing investigations as well as the safety of cooperating defendants. Nevertheless, restricting

electronic access to plea agreements would not fundamentally address the concerns, and in the long term, may prove to be detrimental to the overall interest of protecting cooperating defendants.

First, the proposed restriction provides protection that is illusory. As long as the plea agreements are publicly available, the fact that the plea agreements are inaccessible via the Internet would not pose a significant deterrent to those intent on misusing the information. Presumably, a person who wants to learn the identity of a witness and possibly harm or intimidate him or her is likely to be in or near the federal district in which the cooperator has pled guilty. That person could simply visit the courthouse to review and copy relevant files and observe proceedings. Thus, restricting electronic access would do little to alleviate the security risks to a cooperating defendant resulting from public availability of his or her plea agreement.

Second, restriction of electronic access may revive one of the concerns previously raised regarding restricting electronic access on all court files – namely, that it may encourage the growth of a "'cottage industry' by individuals who could go to the courthouse, copy and scan information, download it to a private website and charge for access, thus profiting from the sale of public information[.]" GUIDANCE FOR IMPLEMENTATION. The same individuals or organizations that are now compiling lists of cooperating defendants and posting them on the Internet could go to the courthouse, convert documents into an electronic format, and charge for the electronic access. In light of the apparent interest in information about cooperating defendants, that risk seems significant. The restriction, therefore, may compound the problem.

The Council believes that procedural mechanisms and protections already in place, specifically the ability to seal sensitive information, better address the concerns raised by the DOJ. The 2003 Policy and pending Federal Rules of Procedure, which will go into effect on December 1, 2007 absent action by Congress, require that certain information be redacted or truncated in filings with the court, including: Social Security and financial account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses. In addition, the new rules will allow courts to seal documents or limit public electronic access to documents on a case-by-case basis if good cause is shown. See Pending Fed. R. Crim. P. 49.1(e). Further, even if the new rules are not enacted, the courts have discretion to seal documents that contain sensitive information, including plea agreements. See Haller, 837 F.2d at 87 (discussing the standards to be met in sealing or redacting a plea agreement).

Accordingly, where security and safety concerns are raised by the contents of plea agreements, prosecutors and defense counsel can file motions to seal such agreements. Judges will then be in a position to assess whether law enforcement concerns or other good cause warrant the sealing of the agreements.

The sealing of plea agreements would provide greater protection for cooperating defendants by preventing the public disclosure of the sensitive information that may reveal their identities. The proposed restriction will not. Moreover, the restriction could have an unintended consequence with respect to sealing motions. Such a restriction could create among judges and attorneys a false sense of security that sensitive information is being protected while, in fact, it is still freely available at the courthouse. That false sense of security could result in decisions by

prosecutors and defense counsel not to seek to seal or by judges not to seal plea agreements when sealing is warranted.

Indeed, some have argued that sealing documents does not adequately address the problem, since "the mere fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives." REPORT OF THE JUDICIAL CONFERENCE COMMITTEE. It is true that when a document is sealed one may infer that a defendant is cooperating. However, if the document is publicly available, one may be able to confirm that a defendant is cooperating. Clearly, restricting electronic access does not solve this problem. As long as the plea agreement is available at the courthouse, the risk that a cooperating defendant's identity will be discovered is present. The Council believes that the risk decreases only if the plea agreement is sealed.

Additionally, under circumstances in which sealing of a plea agreement provides insufficient protection, an entire docket sheet might be sealed. See Hartford Courant v. Pellegrino, 380 F.3d 83, 98 (2d Cir. 2004) ("[I]f the State alleges an extraordinary situation where ... an individual might be put at risk from public docketing ... the district court may take steps to protect the privacy interests involved.") (internal citations omitted); U.S. v. Doe, 63 F.3d 121, 122 (2d Cir. 1995) (an example of a docket placed under seal).

In sum, the Council believes that if the plea agreements are available to the public at the courthouse, they should be available to the public via the Internet. The Council does not believe that the proposal will make a practical difference in terms of addressing the DOJ's legitimate interests in protecting the identity and safety of cooperating defendants. Rather, in light of the safety and security risks raised by the DOJ, prosecutors and defense counsel should be vigilant in seeking the sealing of sensitive plea agreements, and the courts should continue to be sensitive to these concerns. The Council believes that sealing on a case-by-case basis provides a more appropriate, narrowly-tailored solution to law enforcement concerns, while also appropriately balancing these concerns with the public's First Amendment right of access. See In re Herald, 734 F.2d 93, 102 (2d Cir. 1984); Haller, 837 F.2d at 87.

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We appreciate the opportunity to comment on this important issue. If the Federal Bar Council can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Mark C. Zauderer

cc: Jeanette Redmond
Executive Director